

COMMENTS

THE FIRST AMENDMENT AS A TRADE ASSOCIATION SHIELD FROM NEGLIGENCE LIABILITY AND STRATEGIES FOR PLAINTIFFS SEEKING TO PENETRATE THAT SHIELD

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I. INTRODUCTION

Individuals rely on a variety of different sources for dependable data about important issues. Certain agencies or associations specifically hold themselves out as experts in a field and provide information to their members in exchange for fees, benefits to reputation, and/or political lobbying power. These associations, whether for profit or not, gain by inducing their members and the public to rely on the information they distribute. However, these agencies do not always properly research the advice they proffer. In these instances, should such associations be able to use the First Amendment to protect themselves from liability for the recommendations they make?

I believe that these associations should not be able to hold themselves out as experts and then use the First Amendment as a shield from liability if they are wrong and they cause physical harm. The Northern District of Illinois reached this conclusion in an opinion¹ discussed in the first section of this Comment.² When trade associations distribute information negligently such that physical harm is caused to third parties, they should be held responsible. With that premise in mind, this Comment also suggests strategies for plaintiffs who seek to hold trade associations liable for such acts.³

The second section of this Comment focuses on the First

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¹ See *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 25 F. Supp. 2d 837 (N.D. Ill. 1998) [hereinafter *In re Blood Prods. Litig.*]

² See *infra* Section II.

³ See *infra* Section III.

Amendment summary judgment arguments made by the defendant, National Hemophilia Foundation⁴ ("NHF"), and the arguments in opposition to summary judgment made by the plaintiffs, hemophiliacs⁵ who contracted HIV⁶ from contaminated factor concentrate, in *In re Factor VIII or IX Concentrate Blood Products Litigation* (hereinafter *In re Blood Products Litigation*).⁷ This part concludes with an examination of the Northern District of Illinois' denial of NHF's motion for summary judgment.

In light of the court's denial of summary judgment, the third section of this Comment focuses on potential negligence arguments the plaintiffs can make in their respective trials against NHF. These arguments include negligent performance of a voluntary undertaking, negligent misrepresentation, and concert of action. The degree to which such arguments will be successful will vary depending on whether each plaintiff's jurisdiction has adopted certain sections of the Restatement (Second) of Torts ("Restatement") or some version of such sections. In outlining some of these strategies for establishing liability, I have focused on the laws of states that likely will be amenable to such arguments by plaintiffs. The arguments outlined are also applicable to other plaintiffs who seek to defeat trade associations' use of the First Amendment as a shield from liability for the physical harm that misinformation may cause.

II. IN RE FACTOR VII OR IX CONCENTRATE BLOOD PRODUCTS LITIGATION

A. Background

Hemophiliacs, who contracted HIV through transfusions

⁴ NHF is a nonprofit organization that provided information during the late 1970s and 1980s to hemophiliacs and physicians about the blood products used to treat bleeding episodes caused by hemophilia. See *In re Blood Prods. Litig.*, 25 F. Supp. 2d at 837.

⁵ "[H]emophilia is the most common severe, inherited coagulation disorder." *ESSENTIALS OF MEDICINE* 409 (Thomas E. Andreoli et al. eds., 3d ed. 1993). Many victims of the disorder suffer from spontaneous and trauma-induced hemorrhaging. See *id.* at 410. Such bleeding episodes are commonly treated with replacement therapy, whereby concentrates of Factor VIII or IX are infused to raise the plasma levels of these elements to hemostatic levels. See *id.*

⁶ HIV is an abbreviation for human immunodeficiency virus, the virus that can cause acquired immunodeficiency syndrome (AIDS). HIV can be transmitted, among other ways, through transfusion of contaminated blood and blood products. See *id.* at 702.

⁷ *In re Blood Prods. Litig.*, 25 F. Supp. at 837.

with clotting factor concentrate, sued the manufacturers of the products⁸ and, in some cases, NHF. NHF is a nonprofit organization that seeks to promote "programs of research; patient, public and professional education; and patient, family and community services.' The NHF also develops medical treatment standards or recommendations which are disseminated and relied upon by physicians in their treatment of persons with hemophilia."⁹ NHF membership includes state chapters, medical providers and the leading members of the plasma industry.¹⁰

In their complaint against NHF, plaintiffs claimed first "that the NHF established itself as the 'preeminent authority' and 'principal educator' on medical treatment issues impacting persons with hemophilia."¹¹ Second, plaintiffs asserted that, "early in the AIDS epidemic, the NHF assumed a leadership role in informing, guiding and educating hemophiliacs, their treaters, and the media regarding the proper treatment of hemophilia in light of the [HIV and] AIDS risk."¹² Plaintiffs further alleged that, in this role, NHF negligently recommended that they continue using factor concentrate to treat their bleeding episodes when it knew or should have known that the plaintiffs could, and likely would, contract HIV from such products.¹³ Thus, plaintiffs asserted that as a result of NHF's negligent acts, they continued to undergo treatment with factor concentrate and thus contracted HIV.¹⁴

B. NHF's Motion for Summary Judgment First Amendment Arguments

In response to the lawsuit against it, NHF filed a motion for summary judgment.¹⁵ NHF argued that liability on the

⁸ The four manufacturer defendants in Multi-District Litigation ("MDL") 986 are Baxter Healthcare Corporation, Bayer Corporation, Alpha Therapeutic Corporation and Armour Pharmaceutical Company. There has been a mass settlement of the suits against these defendants and their liability is not addressed in this Comment.

⁹ *In re Blood Prods. Litig.*, 25 F. Supp. 2d at 839. The plaintiffs' lawsuits were consolidated in the Northern District of Illinois for pretrial purposes, pursuant to 28 U.S.C. § 1407 (1984 & Supp. 1996). These cases will be remanded for trials to the various states in which they were filed. Thus, with regard to the later sections of this Comment, which discuss the negligence arguments to be made by plaintiffs in their respective trials, the success of those arguments will vary depending on the laws of each plaintiff's state.

¹⁰ *See id.*

¹¹ *Id.*

¹² *Id.*

¹³ *See id.* at 840.

¹⁴ *See id.*

¹⁵ *See* Brief of NHF at 15, *In re Factor VIII or IX Concentrate Blood Prods. Litig.*,

basis of its communications would abridge its First Amendment rights of free speech and free press.¹⁶ Thus, NHF contended that the First Amendment provides an absolute shield from tort suits that allege negligent communications.¹⁷ In the alternative, NHF contended that "it may only be held liable for misstatements only under a malice or 'calculated falsehood' standard."¹⁸ Finally, NHF asserted that "the First Amendment offers a qualified privilege because NHF publications reported on issues of public concern," and that liability cannot attach for its failure to warn because the First Amendment protects it from liability for not speaking.¹⁹

NHF claimed it "never sought to be the sole or controlling source of . . . information" for persons with hemophilia and their physicians; rather, it considered itself to be a voice "presenting one of many possible viewpoints worthy of consideration."²⁰ NHF warned that "imposition of tort liability upon [it for the] treatment recommendations it [promulgated] . . . would have a chilling effect on all voluntary medical societies and nonprofit organizations which seek to add to the public debate on any medical issue."²¹

C. Plaintiffs' Counter-Arguments to NHF's First Amendment Arguments

The plaintiffs, in addition to laying out their negligence arguments, argued that the First Amendment does not "immunize an association like NHF from liability for conduct amounting to negligence" simply because the negligence took

25 F. Supp. 2d 837 (N.D. Ill. 1998) (No. 93 C 7452) [hereinafter Brief of NHF].

¹⁶ See *id.* at 3.

¹⁷ See *id.*

¹⁸ *Id.* at 8 (arguing based on *Time, Inc. v. Hill*, 385 U.S. 374 (1967), that it could "not be held liable for printing provably false information . . . without a showing that [NHF knew the information] was false or [acted] . . . with reckless disregard for the truth").

¹⁹ *In re Blood Prods. Litig.*, 25 F. Supp. 2d at 840. See also Brief of NHF at 8 (No. 93 C 7452) (relying on *Concerned Consumers League v. O'Neill*, 371 F. Supp. 644 (E.D. Wis. 1974), to argue that it should be shielded by the First Amendment from liability because it distributed information regarding the AIDS virus, which was a matter of public concern).

²⁰ Brief of NHF at 2 (No. 93 C 7452).

²¹ *Id.* at 15. See also Kimberly J. Todd, Snyder v. American Association of Blood Banks: *Expansion of Trade Association Liability-Does it Reach Medical Societies*, 29 U. Tol. L. Rev. 149, 175 (1997) (concluding that the court's recognition of trade association liability for negligent promulgation of standards will "pave[] the way for future application of its reasoning to medical societies which develop medical practice parameters").

the form of words or speech.²² Plaintiffs cited the principle from *Schenck v. United States*²³ that First Amendment protection, no matter how fundamental, is not absolute.²⁴

The plaintiffs asserted "that the role being assumed by the party seeking the refuge of the First Amendment is the key to determining whether the First Amendment actually applies."²⁵ Although NHF had characterized "itself as a mere consumer advocacy group or a traditional member of the press,"²⁶ the plaintiffs countered that "NHF's role in the AIDS epidemic [was that] of the chief producer and disseminator of AIDS related information, medical advice, and physician practice standards to and for the benefit of persons with hemophilia and their [medical providers]."²⁷ The plaintiffs further argued that the protection afforded to the press by the First Amendment does not extend to laws that apply generally to all citizens of the United States.²⁸ The plaintiffs asserted that even if NHF was a member of the press, it still had to "abide by laws of general applicability, even though such laws . . . impose[d] incidental burdens on the ability . . . to gather and report the news."²⁹ "The rationale underlying these [arguments is] that there is no threat to a free press in requiring [NHF's] agents to act within the [limits of] the law."³⁰ Thus, the plaintiffs argued that NHF is subject to the common law of negligence and must conform its conduct to generally applicable standards of care.³¹

²² Plaintiffs' Brief in Opposition to National Hemophilia Foundation's Motion for Summary Judgment at 40-41, In re Factor VIII or IX Concentrate Blood Prods. Litig., 25 F. Supp. 2d 837 (N.D. Ill. 1998) (No. 93 C 7452) [hereinafter Plaintiffs' Brief].

²³ 249 U.S. 47, 52 (1919) (holding that whether or not a given utterance is protected by the First Amendment depends on the circumstances).

²⁴ Plaintiffs' Brief at 41. Plaintiffs also cited *Clift v. Naragansett Television L.P.*, 688 A.2d 805 (R.I. 1996), in which the Supreme Court of Rhode Island held that a television station could be held liable for causing a man to commit suicide by negligently broadcasting a telephone interview with him during a sensitive negotiation period. See *id.* at 43-44.

²⁵ *Id.* at 42.

²⁶ *Id.*

²⁷ *Id.* at 42-43.

²⁸ See *id.* at 44 (citing *Cohen v. Cowles Media Co.*, 501 U.S. 663 (1991), and *Food Lion Inc. v. Capital Cities/ABC, Inc.*, 984 F. Supp. 923 (M.D.N.C. 1997), both of which held that generally applicable laws do not offend the First Amendment).

²⁹ *Id.* at 45 (citing *Risenhoover v. England*, 936 F. Supp. 392 (W.D. Tex. 1996), which held that the First Amendment does not immunize a newspaper or television station from liability for negligence associated with news gathering activities).

³⁰ *Id.*

³¹ See *id.* at 46.

*D. The Northern District of Illinois' Denial
of NHF's Motion for Summary Judgment*

In denying NHF's First Amendment-based motion for summary judgment, the Northern District of Illinois addressed each of NHF's arguments.³²

1. Freedom of speech and press

The court first addressed NHF's argument that its publications were entitled to absolute First Amendment protection of speech and press.³³ The court acknowledged that NHF could be treated as a member of the press under *Liberty Lobby, Inc. v. Rees*,³⁴ and that its freedoms of speech and press are protected by the Fourteenth Amendment against abridgement by the states.³⁵ The court also conceded that imposition of tort liability is sufficient state action to implicate the First Amendment.³⁶

The court, however, disagreed with NHF's contention that because its speech was noncommercial it could only be stripped of protection if it constituted libel, obscenity, incitement or fighting words.³⁷ The court determined that NHF's reliance on *Bigelow v. Virginia*³⁸ was misplaced because that case did not hold that those four categories of speech are the only ones that lack First Amendment protection.³⁹ The court held that NHF's argument was further "belied by a considerable body of law denying First Amendment protection in situations not involving obscenity, libel, incitement or fighting words."⁴⁰

³² The court's summary rejection of NHF's argument that the First Amendment protected its right not to speak is not discussed. See *In re Blood Prods. Litig.*, 25 F. Supp. 2d 837, 848 (N.D. Ill. 1998).

³³ See *id.* at 840.

³⁴ 111 F.R.D. 19, 20 (D.D.C. 1986) (noting that First Amendment protections of news-gathering activities are not restricted to the writers of large established newspapers and media enterprises, but are equally applicable to the sole publisher of a newsletter or other writing distributed to the public to inform, comment or criticize).

³⁵ See *In re Blood Prods. Litig.*, 25 F. Supp. 2d at 840 (citing *Thornhill v. State of Alabama*, 310 U.S. 88, 95 (1940)).

³⁶ See *id.* (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964), which held that imposition of tort liability constitutes state action, which implicates the First and Fourteenth Amendments). In this case the action was being taken by a federal court, but the court held that the analysis is the same. See *id.*

³⁷ See *id.* at 841.

³⁸ 421 U.S. 809, 819 (1975).

³⁹ See *In re Blood Prods. Litig.*, 25 F. Supp. 2d at 841.

⁴⁰ *Id.* (citing *Time, Inc. v. Hill*, 385 U.S. 374 (1967), which denied coverage of speech that invaded privacy because there was malice, and *Cohen v. Cowles Media*

The court cited *Cohen v. Cowles Media Co.*,⁴¹ to show that the protections of the First Amendment do not shield the press from laws of general applicability.⁴² The court rejected NHF's unsupported arguments that the principle of general applicability operates only when the law in question governs the business functions of the press and not when it governs the content of the publications.⁴³ The court also focused on the Supreme Court's holding in *Gertz v. Robert Welch, Inc.*,⁴⁴ which recognized that the press may be held liable for defamation under ordinary negligence principles.⁴⁵ Lastly, the court cited precedent that imposes "negligence liability on a member of the press when physical injuries result from its publication."⁴⁶ As a result of these precedents, the court rejected NHF's argument for absolute First Amendment protection.

2. Liability for misstatements

NHF argued that misstatements alone should not subject the association to liability. Quoting a passage from *New York Times Co. v. Sullivan* that "[e]rroneous statement is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive,'" NHF contended that the plaintiffs had

Co., 501 U.S. 663 (1991), which denied coverage of speech that breached a promise of confidentiality).

⁴¹ 501 U.S. 663, 669-70 (1991) (holding that the press has "no special immunity from the application of general laws" and no "privilege to invade the rights and liberties of others").

⁴² See *In re Blood Prods. Litig.*, 25 F. Supp. 2d at 842. A "law of general applicability" is one that applies to all citizens and does not target the press. See *Cohen*, 501 U.S. at 670 (concluding that the doctrine of promissory estoppel is a law of general applicability).

⁴³ See *In re Blood Prods. Litig.*, 25 F. Supp. 2d at 842 n.7.

⁴⁴ 418 U.S. 323, 347 (1974) (holding that states may define the appropriate standard of liability for a publisher or broadcaster of a defamatory falsehood which injures a private individual).

⁴⁵ See *In re Blood Prods. Litig.*, 25 F. Supp. 2d at 844; *Gertz*, 418 U.S. at 346.

⁴⁶ *In re Blood Prods. Litig.*, 25 F. Supp. 2d at 843 (citing *Clift v. Narragansett Television, L.P.*, 688 A.2d 805, 811 (R.I. 1996), which held that, despite the First Amendment's guarantee of freedom of speech and press, there is a right to recover in negligence when a member of the press "causes a person to commit suicide," and *Weirum v. RKO Gen., Inc.*, 539 P.2d 36, 40 (Cal. 1975), which held that the "First Amendment does not sanction the infliction of physical injury merely because achieved by word, rather than act"). See also *Risenhoover v. England*, 936 F. Supp. 392, 405 (W.D. Tex. 1996) (recognizing that "[p]ractically every tort claim involves some form of communication" and holding that a "plaintiff is not divested of a cause of action by the First Amendment merely because a tortfeasor speaks").

to show that NHF published calculated falsehoods.⁴⁷

The court rejected NHF's argument, distinguishing the libel and privacy cases cited by NHF, stating that these context-specific cases applied only to libel suits brought by public figures and did not articulate a broad standard for cases where a defendant is sued for misstatements of fact.⁴⁸ The calculus of interests varies in different contexts, the court reasoned, and thus different standards, including simple negligence, can suffice to establish liability in certain circumstances.⁴⁹ Although the stringent "calculated falsehood" requirement may be appropriate when a public figure brings a defamation action alleging dignitary injuries, the court stressed that this requirement might not be appropriate when considering redress for the physical injuries alleged in this case.⁵⁰

The court held that "[i]n this case, the interest of society in providing redress for the grave injuries alleged should be weighed against the danger of chilling the NHF's communications."⁵¹ The court also acknowledged that the chilling effect might be especially great given the large number of plaintiffs in this case.⁵² However, the court was not persuaded that the potential chilling effect on NHF's communications outweighed society's interest in redressing the kinds of injuries alleged by the plaintiffs.⁵³ The court focused on the fact that liability in this case would not extend to "all the world," because the case involved an organization that supplied information to its known membership, a limited community of persons with hemophilia and their physicians.⁵⁴

Further, the court distinguished other cases where courts found for defendants, despite their publication of misleading information, reasoning that it was "essential to recognize the

⁴⁷ Brief of NHF at 4, 9 (No. 93 C 7452) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 271-72 (1964)).

⁴⁸ See *In re Blood Prods. Litig.*, 25 F. Supp. 2d at 844.

⁴⁹ See *id.* (citing *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 346 (1974), which declined to apply the *New York Times* standard when the defamation plaintiff was a private individual).

⁵⁰ See *id.*

⁵¹ *Id.* at 844-45.

⁵² See *id.* at 845. The court noted that two other courts have found such a chilling effect to be unacceptable. See *id.* (citing *Tumminello v. Bergen Evening Record, Inc.*, 454 F. Supp. 1156, 1160 (D.N.J. 1978) (holding that "the chilling effect of imposing a high duty of care on those in the business of news dissemination and making that duty run to a wide range of readers or TV viewers" would be constitutionally unacceptable) and *Gutter v. Dow Jones, Inc.*, 490 N.E.2d 898, 901 (Ohio 1986) (citing *Tumminello* approvingly)).

⁵³ See *id.*

⁵⁴ See *id.*

exact nature of the interests being asserted in this litigation."⁵⁵ The court emphasized that this litigation did not question whether there should be liability for erroneous communications that are not negligent and do not cause serious physical injury.⁵⁶

The court was careful to acknowledge that medical and scientific opinions can differ with regard to a particular condition or treatment and that liability is not typically imposed for non-negligent errors in judgment.⁵⁷ However, the court held that liability should be "imposed upon medical practitioners who fail to use ordinary care in arriving at recommendations that proximately cause injury to patients."⁵⁸ The court concluded that "[t]he recommendation is a form of expression, since it can be conveyed only orally or in writing, but the First Amendment has never been thought to bar an action for medical malpractice based on such written or spoken expression in a medical context."⁵⁹ The court found no material difference between a medical malpractice action and the claims presented by persons with hemophilia against NHF.⁶⁰

The court, therefore, correctly held that negligence law provides a constitutionally acceptable accommodation of the competing interests asserted in this case and that the First Amendment does not shield NHF from liability for its negligent acts and omissions.⁶¹

3. *Qualified privilege for communications regarding matters of public concern*

Lastly, NHF argued that it was "entitled to First Amendment protection from tort liability when communicating information and opinions to its chapters regarding issues of public concern."⁶² The court rejected this argument, reasoning that NHF had presented no authority for such a privilege.⁶³

The court's own review of the relevant cases led it to conclude that NHF was not entitled to a privilege solely because

⁵⁵ *Id.*

⁵⁶ *See id.*

⁵⁷ *See id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ *See id.* at 846.

⁶² Brief of NHF at 2-3 (No. 93 C 7452).

⁶³ *See In re Blood Prods. Litig.*, 25 F. Supp. 2d at 846.

its publications dealt with matters of public concern.⁶⁴ The court first considered *New York Times Co. v. Sullivan* and acknowledged that the Supreme Court held that "[o]ne of the reasons the newspaper was given a qualified privilege was that the advertisement in question was 'an expression of grievance and protest on one of the major public issues of our time.'"⁶⁵ In *Time, Inc. v. Hill*, the court noted, the Supreme Court applied the same privilege to an invasion of privacy tort because the "subject of the publication was 'newsworthy.'"⁶⁶

The court, however, turning to *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, explained that "libel suits are not automatically subject to the heightened standard articulated by *New York Times* simply because they involve matters of public concern."⁶⁷ The court noted that *Dun & Bradstreet* affirmed the rule that "competing interests must be balanced, with proper weight being given the type of speech involved."⁶⁸ Applying this balancing test, the court explained that it had given NHF's speech the weight that it deserved and concluded that the balance favored the governmental interest in providing a remedy for negligently inflicted physical injuries.⁶⁹

The denial by the Northern District of Illinois of NHF's Motion for Summary Judgment has set a precedent that permits plaintiffs to sue NHF and other trade associations for negligently communicating ideas or recommendations that cause physical harm to third parties. In light of this precedent, it is important for plaintiffs who have been physically injured by trade association conduct to shape their negligence arguments in a manner that will not only defeat summary judgment motions, but will lead to victories at trial.

III. NEGLIGENCE ARGUMENTS THAT CAN BE USED AT TRIAL BY PLAINTIFFS SEEKING TO HOLD TRADE ASSOCIATIONS LIABLE FOR NEGLIGENT ACTS THAT CAUSE PHYSICAL HARM

If other courts follow the Northern District of Illinois' rea-

⁶⁴ The court acknowledged that the public concern cases it reviewed involved defamation rather than negligence, and emphasized that it saw no reason not to apply the analysis of the defamation cases to this case. See *id.* at 847-48.

⁶⁵ *Id.* at 846 (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964)).

⁶⁶ *Id.* (citing *Time, Inc. v. Hill*, 385 U.S. 374, 386 (1967)).

⁶⁷ *Id.* (relying on *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 762 (1985) in which a plurality opinion balanced the competing interests and concluded that a plaintiff construction contractor could recover damages from a credit reporting agency because the credit agency's statements were not of public concern).

⁶⁸ *Id.*

⁶⁹ See *id.*

soning, trade associations will not be able to claim that the First Amendment shields them from liability for proffering recommendations negligently. This is only the first hurdle, however, to holding trade associations liable for their negligent recommendations. Once plaintiffs get to trial, they must make a *prima facie* showing of negligence in order to recover for the injuries they suffered.⁷⁰ Such a *prima facie* case involves a showing of duty, breach, harm and causation. The Restatement provides plaintiffs with four potential bases for their negligence claims, under each of which the plaintiffs will face slightly different burdens.

To show negligence under Restatement section 311,⁷¹ plaintiffs must show that NHF gratuitously provided them or their physicians with information, on which NHF knew the plaintiffs would rely. Plaintiffs will then have to show that NHF either knew or should have known that the information provided posed a risk of physical injury to them, and that their injuries were proximately caused by the negligent misrepresentation. What plaintiffs will not have to show under section 311 is that NHF undertook a specific task for their benefit.

Under sections 323⁷² and 324A⁷³ of the Restatement, the

⁷⁰ The arguments discussed in this part of the Comment will also be applicable to plaintiffs in other cases who are seeking a way to hold a trade association or a similar organization liable for negligent acts that have caused them physical injury. The Northern District of Illinois did not explicitly address the validity of any of the negligence arguments; it held instead that the First Amendment does not bar causes of action under these theories. See *In re Blood Prods. Litig.*, F. Supp. 2d at 848 n.14.

⁷¹ RESTATEMENT (SECOND) OF TORTS: NEGLIGENT MISREPRESENTATION INVOLVING RISK OF PHYSICAL HARM § 311 (1965). This section provides:

- (1) One who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where such harm results
 - (a) to the other, or
 - (b) to such third persons as the actor should expect to be put in peril by the action taken.
- (2) Such negligence may consist of failure to exercise reasonable care
 - (a) in ascertaining the accuracy of the information, or
 - (b) in the manner in which it is communicated.

Id.

⁷² RESTATEMENT (SECOND) OF TORTS: NEGLIGENT PERFORMANCE OF UNDERTAKING TO RENDER SERVICES § 323 (1965). This section provides:

- One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
- (a) his failure to exercise such care increases the risk of such harm, or
 - (b) the harm is suffered because of the other's reliance upon the undertaking.

Id.

plaintiffs will have to show that NHF undertook to render services directly for their benefit (section 323) or directly for the benefit of their physicians, with knowledge that such services were necessary for their protection (section 324A). Plaintiffs will also have to show that they (section 323) or their physicians (section 324A) detrimentally relied on NHF's recommendations. The advantage of making arguments under these two sections is that, depending on the jurisdiction, the plaintiffs may not have to show that NHF's negligent undertaking was the "but for" cause of contracting HIV. Rather, it may be sufficient to show that the negligent undertaking increased the plaintiffs' risk of contracting HIV.

Finally, plaintiffs may argue for NHF liability under section 876⁷⁴ of the Restatement. Under this section, the plaintiffs' negligence argument will be based on the premise that NHF acted in concert with the manufacturers of the blood products to cause their injuries. This argument differs slightly from the others in that the duty portion of the negligence claim may be based on the duty of the blood product manufacturers to the plaintiffs, not just on NHF's duty to the plaintiffs. Plaintiffs may argue that NHF knew that the manufacturers were breaching a duty to them and it assisted with the breach. Plaintiffs may also argue that NHF assisted the manufacturers in causing their injuries and that its own

⁷³ RESTATEMENT (SECOND) OF TORTS: LIABILITY TO THIRD PERSON FOR NEGLIGENT PERFORMANCE OF UNDERTAKING § 324A (1965). This section provides:

One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if

- (a) his failure to exercise reasonable care increases the risk of such harm, or
- (b) he has undertaken to perform a duty owed by the other to the third person, or
- (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Id.

⁷⁴ RESTATEMENT (SECOND) OF TORTS: PERSONS ACTING IN CONCERT § 876 (1965). This section provides:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he

- (a) does a tortious act in concert with the other or pursuant to a common design with him, or
- (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
- (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

Id.

conduct constituted a breach of duty under Restatement section 311, 323 or 324A. Thus, the section 876 argument may stand on its own or supplement one of the other arguments. Whichever route the plaintiffs choose to establish duty under section 876, they will also have to show that the tortious conduct of the manufacturers and NHF proximately caused their injuries.

A. Negligent Misrepresentation: Section 311

Given that NHF is not a typical trade association, in that it did not control the actions of the blood product manufacturers by setting standards and forcing manufacturer compliance with those standards,⁷⁵ plaintiffs may want to first focus on trying to establish NHF liability for negligent misrepresentation.

The basis of liability under Restatement section 311 will be the gratuitous provision of information by NHF, upon which NHF knew consumers would rely, either themselves or through their physicians, and which NHF either knew or should have known posed a risk of physical injury to consumers. Courts have never imposed liability upon a trade-association-type organization on this basis. Thus, plaintiffs will have to analogize to situations in which liability has been found for negligent misrepresentation, for example in the areas of employment recommendations and product endorsements.⁷⁶

⁷⁵ Although associations do not design, manufacture, distribute or sell products, some courts have held nonetheless that associations have a duty to those who rely on the association's services. See *Snyder v. American Ass'n of Blood Banks*, 676 A.2d 1036, 1049 (N.J. 1996) (holding that a blood bank association owed a duty to transfusion recipients); *Prudential Property & Cas. Ins. Co. v. American Plywood Ass'n*, 1994 WL 463527, at *3 (S.D. Fla. Aug. 3, 1994) (holding that the American Plywood Association owed a duty to homeowners to exercise due care in promulgating construction standards); *FNS Mortgage Serv. Co. v. Pacific Gen. Group, Inc.*, 29 Cal. Rptr.2d 916, 918 (Cal. Ct. App. 1994) (holding that the International Association of Plumbing and Mechanical Officials owed a duty to consumers to inspect pipe manufacturers with due care). But see *Meyers v. Donatucci*, 531 A.2d 398, 399 (N.J. Super. Ct. Law. Div. 1987) (holding that the National Spa and Pool Institute did not owe a duty to the general public who used products manufactured or installed by its members); *Beasock v. Dioguardi Enters., Inc.*, 494 N.Y.S.2d 974, 979 (N.Y. Sup. Ct. 1985) (holding that the Tire and Rim Association did not owe a duty to the general public for injuries caused by the product of a member manufacturer).

⁷⁶ See, e.g., *Randi W. v. Muroc Joint Unified Sch. Dist.*, 929 P.2d 583, 584 (Cal. 1997) (holding an employer liable for injuries caused by its former employee to a third party plaintiff because the employer negligently failed to disclose the employee's past sexual improprieties); *Hanberry v. Hearst Corp.*, 81 Cal. Rptr. 519, 523 (Cal. App. 4th 1969) (holding a magazine liable for negligent misrepresentation on the basis that a third party plaintiff was injured by relying upon its endorsement of a

Under section 311, plaintiffs will not have to show that NHF undertook a specific task for their benefit. The plaintiffs will, however, still have to show that the negligent misrepresentations proximately caused them to contract HIV.

Restatement section 311 states:

[o]ne who negligently gives false information to another is subject to liability for physical harm caused by action taken by the other in reasonable reliance upon such information, where harm results (a) to the other, or (b) to such third persons as the actor should expect to be put in peril by the action taken.⁷⁷

Comments following section 311 state that the rule may apply where physical harm results even though the information is provided purely gratuitously and is unrelated to any personal interest of the actor.⁷⁸

Negligence under section 311 "may consist of a failure to make a proper inspection or inquiry, or of failure after proper inquiry to recognize that the information given is not accurate."⁷⁹ A defendant is required, under the reasonable person standard, to exercise due care under the circumstances to ascertain the facts and to ensure that the information provided is accurate given the facts discovered.⁸⁰ The Restatement comments equate an omission or a failure to disclose the existence of a known danger with an actual misrepresentation when it should be foreseen that another will rely upon an appearance of safety.⁸¹

The Supreme Court of California combined the Restatement standard with clarifications made by Prosser and Keeton, thus, expanding the tort of negligent misrepresentation in physical harm cases and establishing a four part test: 1) Whether the defendant had a duty to use reasonable care in providing the information; 2) Whether the defendant breached that duty by failing to exercise reasonable care in ascertaining the accuracy of the information provided or in communicating the information; 3) Whether the plaintiff actually and reasonably relied on the alleged misrepresentations; and 4) Whether the misrepresentations proximately caused the plaintiff's injuries.⁸²

product).

⁷⁷ RESTATEMENT (SECOND) OF TORTS: NEGLIGENT MISREPRESENTATION INVOLVING RISK OF PHYSICAL HARM § 311 (1) (1965).

⁷⁸ See *id.*, cmt. c, at 107.

⁷⁹ *Id.*, cmt. d, at 108.

⁸⁰ See *id.*

⁸¹ See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 33 at 207 (5th ed. 1984).

⁸² See *Garcia v. Superior Court*, 789 P.2d 960, 963-65 (Cal. 1990). Other states

The California Supreme Court further expanded the negligent misrepresentation standard in *Randi W. v. Muroc Joint Unified School*.⁸³ While this case addressed the standard in the context of letters of employment reference, it provides arguments that may be made by analogy in the NHF situation. The standard provides that employers owe a duty to prospective employers and third parties not to misrepresent the descriptions and qualifications of a former employee, if making such representations would create a "substantial, foreseeable risk of physical injury" to third parties.⁸⁴ Breach of this duty can be established by showing that the employer made an unqualified recommendation and failed to disclose other facts that materially qualified the recommendation.⁸⁵ A third person need *not* allege that she relied on the employer's representations directly; she only needs to allege that her injury resulted from action taken by the recipient of the misrepresentations in reliance on them.⁸⁶ This expansion may be critical to the plaintiffs' arguments if they cannot show that they personally relied on NHF's representations.

Arguing by analogy, if a court were to adopt a standard similar to this in the context of information provided by associations like NHF, the plaintiffs would have to establish that NHF owed a duty because it provided information that presented a substantial, foreseeable risk of physical injury to third persons. Plaintiffs would then be able to establish breach by pointing to specific misrepresentations that reflect negligent communication of information by NHF or negligent failure to properly investigate the accuracy of the information provided. Breach could also be established by showing that NHF unqualifiedly recommended continued factor use while failing to disclose other facts that would have materially qualified this recommendation. In establishing causation, plaintiffs would have the option of showing that either they relied on the information provided by NHF or their medical providers relied on such information.⁸⁷ To complete the cau-

have also adopted the Restatement standard from section 311 for negligent misrepresentation. See, e.g., *Board of Educ. v. A, C & S, Inc.*, 546 N.E.2d 580 (Ill. 1989).

⁸³ 929 P.2d 583, 591 (Cal. 1997).

⁸⁴ *Id.* at 591.

⁸⁵ See *id.*

⁸⁶ See *id.* at 594 (finding that the employer's reliance on the negligent misrepresentation in the letter of recommendation sufficed to establish the reliance element of the third party plaintiff's claim); see also *Golden Spread Council, Inc. v. Akns*, 926 S.W.2d 287, 291 (Tex. 1996) (holding that, having undertaken to recommend a potential scoutmaster for a church, Golden Spread Council had a duty to use reasonable care in doing so to prevent an unreasonable risk of harm to others).

⁸⁷ See *Randi W.*, 929 P.2d at 594.

sation prong of the negligent misrepresentation argument, plaintiffs will have to show that absent their reliance on NHF's recommendations they likely would not have contracted HIV.

*B. Negligent Performance of a Voluntary Undertaking:
Section 323*

Section 323 of the Restatement provides another possible argument for NHF liability. Unlike section 311, under this section plaintiffs will have to show that NHF undertook to provide services for their benefit. The section provides that a defendant

who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if (a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking.⁸⁸

Plaintiffs will argue that Section 323 is applicable to NHF because it undertook to render services directly for their benefit, and it performed those services negligently. Plaintiffs will then argue that they contracted HIV because of their detrimental reliance on that negligent undertaking and that the negligent undertaking increased their risk of contracting HIV.⁸⁹ This section provides an advantage to plaintiffs because, depending on the jurisdiction, the plaintiffs may not have to show that the negligent undertaking proximately caused them to contract HIV. Rather, it may be sufficient to show that the negligent undertaking increased the plaintiff's risk of contracting HIV.

Many states have adopted section 323 as law.⁹⁰ For the

⁸⁸ RESTATEMENT (SECOND) OF TORTS: NEGLIGENT PERFORMANCE OF UNDERTAKING TO RENDER SERVICES § 323 (1965).

⁸⁹ In *In re Blood Products Litigation* plaintiffs allege the following: NHF undertook to educate hemophiliacs and their physicians regarding the treatment of hemophilia in light of the risk of contracting HIV; NHF established itself as a clearinghouse for information about HIV; NHF induced hemophiliacs and their physicians to rely on its treatment recommendations; NHF continued to recommend that hemophiliacs treat their bleeding episodes with factor concentrates after a time when it knew such products were transmitting HIV. See Plaintiffs' Brief at 29-30.

⁹⁰ See, e.g., *Green v. Unity Sch. of Christianity*, 991 S.W.2d 201, 205 (Mo. Ct. App. 1999) (adopting section 323 as the standard for Missouri Law); *Lloyd v. State Farm Mut. Auto. Ins. Co.*, 860 P.2d 1300, 1305 (Ariz. Ct. App. 1993) (same for Arizona law) *Frye v. Medicare-Glaser Corp.*, 579 N.E.2d 1255 (Ill. App. Ct. 1991) (same

sake of simplicity this section will focus on the law of Pennsylvania because it should be favorable to the plaintiff hemophiliacs who are trying their suits in that state. Pennsylvania courts have established that a plaintiff proceeding under section 323 must establish the underlying elements of an action in negligence:⁹¹ a cognizable legal duty or obligation requiring the actor to adhere to a certain standard of conduct; a failure to conform to the required standard; causation between the conduct and the resulting injury; and actual loss or damage to another party's interests.⁹²

1. *Duty under section 323*

Under section 323, to show that NHF owed them a duty, plaintiffs will have the burden of showing that the association undertook to provide services directly for their benefit. In establishing duty under section 323, plaintiffs must focus on the professed intention of the association's undertaking.

For example, in *Gunsalus v. Celotex*,⁹³ the plaintiff argued under section 323 that the "Tobacco Institute 'undertook the task of collecting and disseminating scientific, medical and other information about tobacco to the public . . .'" and was negligent in performing this task.⁹⁴ The court held that the Tobacco Institute's statements that it would aid and assist in research efforts were insufficient to create a duty to inform the plaintiff of all dangers related to cigarette smoking, in part because the plaintiff did not show that the Tobacco Institute's failure to fulfill its promises increased the risk of harm to the plaintiff.⁹⁵ The court determined that the plaintiff had not detrimentally relied on the Institute's alleged undertaking because there were other sources of information on the dangers of smoking available, and because the plaintiff's doctor had advised him to stop smoking several times.⁹⁶

In *Friedman v. F.E. Myers, Co.*,⁹⁷ the court found that an association of water pump manufacturers owed the plaintiff

for Illinois law); *Gradel v. Inouye*, 421 A.2d 674 (Pa. 1980) (same for Pennsylvania law).

⁹¹ See *Morena v. South Hills Health Sys.*, 462 A.2d 680, 684 (Pa. 1983) ("[This section] does not . . . change the burden of a plaintiff to establish the underlying elements of an action in negligence, nor can it be invoked to create a duty where one does not exist.") (footnote omitted).

⁹² See *id.* at n.5 (establishing the elements in a negligence action).

⁹³ 674 F. Supp. 1149 (E.D. Pa. 1987).

⁹⁴ *Id.* at 1156.

⁹⁵ See *id.* at 1157.

⁹⁶ See *id.*

⁹⁷ 706 F. Supp. 376 (E.D. Pa. 1989).

no duty under section 323 because the association did not undertake a "specific task" for the benefit of the plaintiff.⁹⁸ Furthermore, the court held that even if the association did undertake to inform the public about well-pump contaminants, there was no evidence that the plaintiff relied on the association's performance.⁹⁹

These cases demonstrate that, in order to establish duty under section 323, the plaintiffs in *In re Blood Products Litigation* will have to show several things. First, they will need to show that NHF undertook to provide services that it intended to directly benefit hemophiliacs. Plaintiffs will then need to show that NHF induced reliance on its research and its dissemination of information and recommendations regarding HIV and factor concentrate usage.¹⁰⁰ If a court finds both of these elements, it is likely to find that NHF owed the plaintiffs a duty.

2. Causation under section 323

While establishing duty under section 323 may be more difficult for plaintiffs, because they will need to show a specific undertaking for their benefit,¹⁰¹ causation may be easier to establish than it would be under section 311.

In jurisdictions that take the same approach as the Pennsylvania Supreme Court, plaintiffs may establish causation by showing only that NHF's negligent performance of its voluntary undertaking increased their risk of harm. The Pennsylvania Supreme Court has held that when section 323(a), implicating increased risk of harm, is applicable, it "relaxes the degree of certainty ordinarily required of a plaintiff's evidence to provide a basis upon which the jury may find causation."¹⁰² Once a plaintiff shows that a defendant's acts or omissions have increased the potential of harm to another, a fact-finder may find, without further proof of causation, that

⁹⁸ See *id.* at 383.

⁹⁹ See *id.* (holding that trade association owed the plaintiff/consumer no duty).

¹⁰⁰ For example, NHF billed itself as an advocacy group for hemophiliacs and claimed to be a clearinghouse for information on HIV and hemophilia. NHF newsletters gave specific recommendations for physicians to follow and directed hemophiliacs to contact NHF directly with any HIV questions. Arguably both plaintiffs and their treaters were deterred from researching HIV/hemophilia issues themselves or looking for other sources of information about these issues because NHF held itself out as a reliable authority. Plaintiffs' Brief at 5-10.

¹⁰¹ See *Patentas v. United States*, 687 F.2d 707, 716 (3d Cir. 1982) (holding that under Pennsylvania law, a good Samaritan who voluntarily undertakes a task may not perform that task negligently).

¹⁰² *Gradel v. Inouye*, 421 A.2d 674, 678 (Pa. 1980).

such increased risk was a substantial factor in bringing about the resultant harm.¹⁰³ This precedent¹⁰⁴ will be helpful to the plaintiffs because showing that NHF's negligent performance of its gratuitous undertaking increased their risk of contracting HIV will be much easier than establishing that NHF's negligence was the "but for" cause of the contraction.

C. Liability to a Third Person for Negligent Performance of a Voluntary Undertaking: Section 324A

Plaintiffs may also make a negligence argument under section 324A of the Restatement. This section, like section 323, requires plaintiffs to show a specific undertaking by NHF in order to establish duty. Under section 324A, plaintiffs can show that NHF undertook to provide services for the physicians of hemophiliacs (rather than for the hemophiliacs themselves) that the association knew were necessary for the protection of third-party hemophiliacs. Section 324A also provides, however, the potential causation advantage of section 323, because, depending on the jurisdiction, plaintiffs may only need to show that the negligent undertaking increased their risk of contracting HIV. Section 324A provides that a defendant

who undertakes gratuitously, or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protect his undertaking, if (a) his failure to exercise reasonable care increases the risk of such harm; or (b) he has undertaken to perform a duty owed by the other to the third person; or (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.¹⁰⁵

Many states have adopted section 324A as law.¹⁰⁶

¹⁰³ See *Hamil v. Bashline*, 392 A.2d 1280, 1288 (Pa. 1978). In that case the Pennsylvania Supreme Court held that:

once a plaintiff has demonstrated that defendant's acts or omissions . . . have increased the risk of harm to another, such evidence furnishes a basis for the fact-finder to go further and find that such increased risk was in turn a substantial factor in bringing about the resultant harm; the necessary proximate cause will have been made out if the jury sees fit to find cause in fact.

Id.

¹⁰⁴ Unfortunately, many states do not follow this approach, so each plaintiff must carefully examine the law of his/her jurisdiction before making the causation argument.

¹⁰⁵ RESTATEMENT (SECOND) OF TORTS: LIABILITY TO THIRD PERSON FOR NEGLIGENT PERFORMANCE OF UNDERTAKING § 324A (1965).

¹⁰⁶ See generally *Huggins v. Aetna Cas. & Sur. Co.*, 264 S.E.2d 191, 192 (Ga. 1980) (establishing section 324A as the appropriate statement of the law in Georgia);

Thus, in these states, when a trade association, acting voluntarily or for consideration, agrees to render services to its member manufacturers¹⁰⁷ that affect the safety of third party consumers, the third party consumers may sustain an action under section 324A. The plaintiffs in the *In re Blood Products Liability* lawsuit may argue that section 324A should be applied in their case because NHF breached a duty to them by negligently promulgating treatment recommendations for their physicians, which proximately caused them to contract HIV. Duty and causation are discussed separately and in more detail in this section because there is more case law addressing section 324A than the other Restatement sections discussed in this Comment, and because the duty and causation arguments under section 324A may be easily confused.

1. *Establishing duty under section 324A*¹⁰⁸

In arguing that NHF breached a duty under section 324A, plaintiffs may use case law establishing that associations owe a duty to third parties whose safety is potentially implicated by the actions of the members of the association. Plaintiffs may then analogize those cases to its situation, arguing that NHF was the association and the physicians of hemophiliacs were its members.

In most jurisdictions, plaintiffs should be able to find cases which have established that trade associations owe a duty to third parties. For example, in *Martinez v. Perlite Institute*,¹⁰⁹ the court held that a defendant trade association owed a duty to third persons because it had specifically undertaken to test a member company's perlite ores for dangerous toxic substances.¹¹⁰

Pippin v. Chicago Hous. Auth., 399 N.E.2d 596, 600 (Ill. 1979) (same for Illinois); Walsh v. Pagra Air Taxi, Inc., 282 N.W.2d 567, 570-71 (Minn. 1979) (same for Minnesota).

¹⁰⁷ The services performed by trade associations in these cases usually consist of product certification, safety inspections, or standards promulgation. See, e.g., Toman v. Underwriters Labs., Inc., 707 F.2d 620 (1st Cir. 1983) (product certification); Patentas v. United States, 687 F.2d 707 (3d Cir. 1982) (safety inspection); Heinrich v. Goodyear Tire & Rubber Co., 532 F. Supp. 1348 (D. Md. 1982) (standards promulgation).

¹⁰⁸ See generally Ralph G. Wellington & Vance G. Camisa, *The Trade Association and Product Safety Standards: Of Good Samaritans and Liability*, 1990 DEF. L.J. 1 (examining trade association liability for negligent promulgation of safety standards).

¹⁰⁹ 120 Cal. Rptr. 120 (Cal. Ct. App. 1975).

¹¹⁰ See *id.* at 125.

In *Hall v. E.I. Du Pont De Nemours & Co.*,¹¹¹ the court held that the blasting cap industry's trade association could be held liable to third party plaintiffs because the manufacturers had delegated the duty of monitoring the safety of the blasting caps to the association.¹¹² The court emphasized that it was "entirely reasonable for the individual manufacturers to delegate this function to a jointly-sponsored, jointly-financed association."¹¹³ Furthermore, the court found that the association should not be absolved of liability for negligently performing its delegated duties.¹¹⁴ In similar situations, other courts have held that Good Housekeeping and Underwriters' Laboratories, organizations similar to trade associations because they certify products, may owe a duty to third persons.¹¹⁵

The court in *Rick v. RLC Corp.*¹¹⁶ discussed the basic requirements necessary to establish a duty under section 324A.¹¹⁷ The court held that whether a defendant's undertaking is gratuitous or contractual, the evidence must show that the defendant assumed an obligation or intended to render services for the benefit of another.¹¹⁸ The court also held that plaintiffs alleging a negligently promulgated safety standard need to show that the standard was established for the specific product that caused the injury.¹¹⁹ Finally, the court held that plaintiffs must show that it was foreseeable that they would be injured by the defendant's "failure to perform the undertaking with reasonable care."¹²⁰

Trade associations often act in an advisory capacity in promulgating manufacturing/safety recommendations.¹²¹ For

¹¹¹ 345 F. Supp. 353 (E.D.N.Y. 1972).

¹¹² See *id.* at 378.

¹¹³ *Id.* at 359.

¹¹⁴ See *id.* at 386.

¹¹⁵ See *Toman v. Underwriters Labs., Inc.*, 707 F.2d 620, 621 (1st Cir. 1983) (holding that Underwriters Laboratories (UL) owed a duty to purchasers of a hair-dryer that UL certified as safe); *Hanberry v. Hearst Co.*, 81 Cal. Rptr. 519, 522-23 (Cal. App. 4th 1969) (holding that the publishers of Good Housekeeping Magazine owed a duty to consumers of shoes that the magazine guaranteed as safe).

¹¹⁶ 535 F. Supp. 39 (E.D. Mich. 1981).

¹¹⁷ See *id.* at 45.

¹¹⁸ See *id.*

¹¹⁹ Compare *Muniz v. National Can Corp.*, 737 F.2d 145, 149 (1st Cir. 1984) (finding that no duty was proven where a parent corporation provided general safety guidelines "not specifically directed" to the instrument that caused plaintiff's injury), with *Heinrich v. Goodyear Tire & Rubber Co.*, 532 F. Supp. 1348, 1354 (D. Md. 1982) (holding that a duty may exist when a parent corporation provided safety information specifically directed to the instrument that caused the plaintiff's injury).

¹²⁰ *Rick*, 535 F. Supp. at 43 (citing *Smith v. Allendale Mut. Ins. Co.*, 303 N.W.2d 702, 712 (Mich. 1981)).

¹²¹ See generally GEORGE LAMB & CARRINGTON SHIELDS, TRADE ASSOCIATION LAW AND

this reason, some courts have found that a trade association's promulgation of such recommendations does not establish a duty.¹²² Nevertheless, industry compliance with recommendations promulgated by trade associations is typically so consistent that such recommendations essentially become mandatory operation standards.

Several courts have found that trade association duty existed solely on the basis of negligent promulgation of standards that were followed by a member, and subsequently caused a third party to be injured.¹²³ For example, a district court in Florida, while not basing its finding on section 324A, found that the American Plywood Association (APA) owed a "duty to homeowners to exercise due care in promulgating construction standards."¹²⁴ APA advocated "use of plywood roof sheathing" and "an unreasonably dangerous nailing pattern in an effort to increase the sales and profits of [its] members who manufacture[d] structural wood panels."¹²⁵ APA placed the blame for the harm suffered by consumers on the building code that the plaintiff homeowner had to follow; the court, however, reasoned that since APA held itself out as a research and testing agency, the code itself justifiably relied on APA recommendations.¹²⁶ Thus, even though compliance with the standards promulgated by APA was not mandatory, the court still held APA liable.

The Supreme Court of Alabama relied on section 324A in finding that the National Spa and Pool Institute (NSPI) owed a duty to third party consumers not to promulgate standards for pool design and construction negligently.¹²⁷ The court

PRACTICE 77-78 (Trade Regulation Series, rev. ed. 1971).

¹²² See, e.g., *Blalock v. Syracuse Stamping Co.*, 584 F. Supp. 454, 456-57 (E.D. Pa. 1984) ("The threshold issue under § 324A is whether the party charged undertook a duty to the person for whom services were allegedly performed or to an injured third party."); *Meyers v. Donnatacci*, 531 A.2d 398, 403 (N.J. Super. Ct. Law. Div. 1987) (stating that promulgating advisory standards for industry members does not create a duty to third parties); *Beasock v. Dioguardi Enters. Inc.*, 494 N.Y.S.2d 974, 979 (N.Y. Sup. Ct. 1985) (stating that, at a minimum, to find a third party liable for acts of another, a plaintiff must prove that the third party had "a relationship with the tortfeasor sufficient to exercise control over the culpable conduct" to establish that a duty existed).

¹²³ See, e.g., *Prudential Property and Cas. v. American Plywood Ass'n*, No. 932026, 1994 WL 463527, at *3 (S.D. Fl. Aug. 3, 1994) (finding that the American Plywood Association owed a duty to consumers because it promulgated standards which affected their well-being).

¹²⁴ *Id.* at *3 (finding that the APA had a duty to exercise due care in promulgating standards).

¹²⁵ *Id.* at *1.

¹²⁶ See *id.* at *3.

¹²⁷ See *King v. National Spa and Pool Inst.*, 570 So.2d 612 (Ala. 1990), rev'd on other grounds, 578 So.2d 1285 (Ala. 1991).

found that NSPI could be held liable for the injury that the plaintiff sustained while diving into a defective pool if the pool manufacturer relied on negligently-formulated NSPI standards in constructing or installing the pool.¹²⁸ Although NSPI voluntarily undertook to create and disseminate standards to its members for the purpose of influencing their design and construction practices, it was foreseeable that harm might result to consumers if due care was not exercised.¹²⁹ Again, compliance with NSPI standards was not mandatory, but because this particular manufacturer did rely on those standards and this reliance caused the plaintiff's injury, NSPI was held liable.

Similarly, the New Jersey Supreme Court found that the American Association of Blood Banks (AABB) owed a duty of care to a consumer who contracted HIV from contaminated blood products.¹³⁰ While the court did not focus on section 324A, the duty of care issues paralleled those in *King*. Plaintiffs alleged in this case that AABB promulgated regulations for its members and should have foreseen that those regulations would impact the safety of third-party consumers.¹³¹ In finding that AABB owed a duty of care to blood product recipients, the court focused on the unique and dominant role of the AABB in the blood banking industry and the extent of its control over its members.¹³² The court recognized that AABB, while claiming to be a charitable organization, represented the interests of its members, and at stake for its members was a substantial financial interest in the regulation of the industry.¹³³ Further, the court emphasized that AABB sought and cultivated responsibility for the safety of the nation's blood supply; it thus owed a duty to those who relied on it to use due care in promulgating its blood bank regulations.¹³⁴ Lastly, the court found that AABB should have foreseen that its failure to exercise due care by not recommending surrogate testing of donors for HIV would result in injury to the plaintiff.¹³⁵

The plaintiffs in *In re Blood Products Litigation*, and the plaintiffs in any other suits against a trade association under

¹²⁸ See *id.* at 614.

¹²⁹ See *id.* at 616.

¹³⁰ See *Snyder v. American Ass'n of Blood Banks*, 676 A.2d 1036, 1049 (N.J. 1996).

¹³¹ See *id.* at 1038.

¹³² See *id.* at 1050.

¹³³ See *id.*

¹³⁴ See *id.*

¹³⁵ See *id.* at 1048.

section 324A, must first determine the scope of the trade association's undertaking; this will then define the scope of the trade association's duty.¹³⁶ In the case of NHF, plaintiff hemophiliacs can argue that NHF undertook to promulgate hemophilia/HIV treatment standards for the benefit of member physicians who cared for persons with hemophilia and that these standards were uniformly followed by the industry. Plaintiffs can further argue that NHF knew or should have known that the standards it promulgated would impact the safety of persons with hemophilia.

2. Establishing causation under section 324A

Once plaintiffs have established NHF's duty and breach under section 324A, they will have to establish that the breach more likely than not caused their injury. To establish causation, plaintiffs will have to show one of the following: (a) the trade association's failure to exercise reasonable care in promulgating standards increased the risk of injury that plaintiffs suffered;¹³⁷ (b) the trade association undertook to perform a duty owed by the member manufacturers to the plaintiffs;¹³⁸ or (c) the trade associations induced the plaintiffs, or the member manufacturers, to rely upon the trade association's undertaking, which, in turn, caused plaintiff's injuries.¹³⁹ Although intricately linked to the question of duty, these sections of 324A are usually applied in the causation analysis.¹⁴⁰

a. Section 324A(a): Increased risk of harm

In some jurisdictions, plaintiffs may establish causation under section 324A(a) the same way they may establish cau-

¹³⁶ See, e.g., *Blessing v. United States*, 447 F. Supp. 1160, 1189-1190 (E.D. Pa. 1978) (stating that in similar factual situations, the Third Circuit followed the rule that "duty is measured by undertaking").

¹³⁷ See RESTATEMENT (SECOND) OF TORTS: LIABILITY TO THIRD PERSON FOR NEGLIGENT PERFORMANCE OF UNDERTAKING § 324A(a) (1965).

¹³⁸ See *id.* at § 324A(b).

¹³⁹ See *id.* at § 324A(c); see also *Canipe v. Nat'l Loss Control Serv. Corp.*, 736 F.2d 1055, 1062 (5th Cir. 1984) (denying defendant's motion for summary judgment on the basis that a jury could find that the defendant performed its inspection of plaintiff's employer's premises negligently and that this negligence proximately caused plaintiff's injuries).

¹⁴⁰ See generally *Ricci v. Quality Bakers*, 556 F. Supp. 716, 720 n.10 (D. Del. 1983) ("Courts and commentators have construed the provisional requirements of section 324A to state the requirements of the scope of a third party's duty to others or to state the requirements of proximate cause") (emphasis added).

sation under section 323, by showing that NHF's negligent performance of its voluntary undertaking increased their risk of contracting HIV. The courts vary in their application of section 324A(a), but causation has been found where an association promulgates a safety standard or endorses a product that increases the risk of injury to a third party.¹⁴¹

For example, in *Hempstead v. General Fire Extinguisher Corp.*,¹⁴² the court found Underwriters Laboratory (UL) liable under section 324A(a) for injury caused to a third person by the explosion of a fire extinguisher labeled by UL.¹⁴³ The court focused on the arrangement between the manufacturer and UL, which provided that UL would prescribe standards of construction which would render the product safe for use.¹⁴⁴ UL was held liable because it failed to use reasonable care in approving the extinguisher's design, which increased the risk of harm to the plaintiff.¹⁴⁵

More recently, a California court held the International Association of Plumbing and Mechanical Officials (IAPMO) liable under section 324A(a) to a plaintiff injured by a certified faulty pipe because it undertook to inspect pipe manufacturers and de-list those that did not "adhere to [the] standards it . . . promulgated."¹⁴⁶ The court held that "IAPMO's failure to exercise reasonable care in its undertakings increase[d] the risk of harm to . . . consumers from defective pipe that otherwise would have been removed from the stream of commerce."¹⁴⁷

Some courts require a specific showing that the safety recommendation and/or inspection changed the plaintiff's environment for the worse before they will find 324A(a) liability. In *Patentas v. United States*,¹⁴⁸ the court held that a Coast Guard inspection of a tanker that later exploded was not enough to establish 324A(a) liability because there were only

¹⁴¹ See, e.g., *Kohr v. Johns-Manville Corp.*, 534 F. Supp. 256, 258 (E.D. Pa. 1982) (holding that an insurance company study group drew conclusions about asbestos exposure without reasonable care, thus increasing the risk of harm to the plaintiff through its recommendations); see also, *Heinrich v. Goodyear Tire & Rubber Co.*, 532 F. Supp. 1348, 1355 (D. Md. 1982) (explaining that the mere recommendation of standards can result in liability under section 324A(a)).

¹⁴² 269 F. Supp. 109 (D. Del. 1967).

¹⁴³ See *id.* at 118.

¹⁴⁴ See *id.* at 117.

¹⁴⁵ See *id.* at 118.

¹⁴⁶ *FNS Mortgage v. Pacific Gen. Group*, 29 Cal. Rptr. 2d 916, 921 (Cal. Ct. App. 1994).

¹⁴⁷ *Id.*

¹⁴⁸ 687 F.2d 707 (3d Cir. 1982).

signs of omission—not commission.¹⁴⁹ The court explained that increased risk of harm means “some . . . change to the environment or some other material alteration of circumstances.”¹⁵⁰ The court held that although the Coast Guard inspected the tanker, it did not change the environment of the plaintiffs simply by doing so.¹⁵¹

Quoting the *Patentas* “omission/commission” language, the court in *Ricci v. Quality Bakers*,¹⁵² found that the defendant was not liable under 324A(a) because the hazard alleged to have caused the injury existed independently of any negligent inspection or recommendation of the defendant.¹⁵³ The court noted that, at worst, defendant’s alleged conduct “permitted the continuation of an existing risk.”¹⁵⁴

Courts have applied these standards inconsistently to determine whether a trade association or similar entity increased a plaintiff’s risk of harm via promulgation of a safety recommendation and/or inspection. However, where trade association recommendations are considered mandatory, it should be enough to establish negligent promulgation of those recommendations to show that defendant’s act caused plaintiff’s injury. Under this principle, plaintiffs can establish NHF liability by showing that it negligently established a treatment standard that increased their risk of harm.

b. Section 324A(b): Undertaking to perform a duty owed by another

In contrast to section 324A(a), under which plaintiffs have the lesser burden of showing that NHF increased their risk of harm, under section 324A(b) the plaintiffs must show that NHF caused their harm by negligently performing a duty owed to them by their physicians. Plaintiffs will be able to establish causation if they can show that NHF undertook to perform part of the duty owed them by their physicians when NHF recommended continued treatment with factor concentrate.

Examples of such causation can be found in cases in which courts have held that, by creating product safety standards, certifying a product, or performing a safety inspection,

¹⁴⁹ See *id.* at 716 (“Their critical defect is the appellants’ inability to identify signs of commission rather than omission.”).

¹⁵⁰ *Id.* at 717.

¹⁵¹ See *id.*

¹⁵² 556 F. Supp. 716 (D. Del. 1983).

¹⁵³ See *id.* at 720.

¹⁵⁴ *Id.* (internal quotations omitted).

a trade association attempts to perform a duty that a manufacturer or other entity usually owes to consumers.¹⁵⁵ The finding of causation is based on the conclusion that, absent the negligent undertaking of the duty by the association, the plaintiff would not have suffered harm.

According to some courts, section 324A(b) is applicable as long as the party who owes the plaintiff a duty of care has delegated to the defendant any part of that duty.¹⁵⁶ In *Hill v. James Walker Memorial Hospital*,¹⁵⁷ a hospital hired an exterminating company to rid the hospital of rats, and the plaintiff was injured when she fell upon seeing a rat.¹⁵⁸ The court held that the exterminating company could be found liable because it had undertaken to perform a certain aspect of the hospital's duty to its patients to exercise reasonable care for their safety.¹⁵⁹ Thus, in jurisdictions following this standard, liability attaches when a trade association accepts responsibility for any part of a duty owed to a third party. Under this interpretation of 324A(b), the plaintiffs in this case can establish causation by showing that part of the physicians' duties of care to persons with hemophilia was delegated to NHF.

This argument will not prevail, however, in jurisdictions that find causation only upon a showing that the trade association completely undertook the responsibility of the manufacturers. For example, the court in *Blessing v. United States*¹⁶⁰ held that the plaintiff must demonstrate that the trade association's inspection was "on behalf of and in lieu of" the employer's inspection to prove that the trade association's acts caused the plaintiff's harm.¹⁶¹ The District of Maryland applied the *Blessing* rationale in *Heinrich v. Goodyear Tire and Rubber Co.*¹⁶² to hold that the plaintiffs failed to establish causation when they did not allege that the defendant com-

¹⁵⁵ For example, in *FNS Mortgage v. Pacific General Group*, the court found that IAPMO, by inspecting pipe manufacturers and delisting those that did not adhere to its standards, had undertaken to perform a duty owed by local building officials to consumers. See 29 Cal. Rptr. 2d 916, 921 (Cal. Ct. App. 1994). The consumers suffered harm because of the local building official's reliance on IAPMO. See *id.*

¹⁵⁶ See, e.g., *Canipe v. National Loss Control Serv. Corp.*, 736 F.2d 1055, 1061 (5th Cir. 1984) (finding that liability may result if the employer delegated any part of its duty to a trade association); *Santillo v. Chambersburg Eng'g Co.*, 603 F. Supp. 211, 215 (E.D. Pa. 1985) (holding that the defendant was delegated a portion of another party's duty of care).

¹⁵⁷ 407 F.2d 1036 (4th Cir. 1969).

¹⁵⁸ See *id.* at 1038.

¹⁵⁹ See *id.* at 1042.

¹⁶⁰ 447 F. Supp. 1160 (E.D. Pa. 1978).

¹⁶¹ See *id.* at 1193-94.

¹⁶² 532 F. Supp. 1348 (D. Md. 1982).

pletely assumed the employer's duty.¹⁶³ Under these precedents, it will be more difficult for plaintiff hemophiliacs to establish causation because they will have to show that NHF completely undertook to perform the duties of their physicians.

c. Section 324A(c): Reliance

Under the third provision of section 324A, a court may find causation where the third person suffers harm because of reliance upon the defendant's undertaking. The meaning of reliance is clarified by the comments to 324A, which require the injury to result because the person to whom the service is rendered or the third person decided to forego other risk-reducing measures.¹⁶⁴ In *In re Blood Products Litigation*, plaintiff hemophiliacs will have to establish that their physicians, in relying on NHF's treatment recommendations, forwent either establishing their own safety standards or the opportunity to follow someone else's safety recommendations.¹⁶⁵

Some courts have held that reliance is not established merely because safety recommendations were made and implemented.¹⁶⁶ These courts require some evidence of a change in position, but they vary with regard to the degree of change required. Some courts have held that the reliance element of subsection (c) is satisfied if, in relying on the defendant's undertaking, the manufacturer neglects or reduces its own safety program.¹⁶⁷

This interpretation will be helpful to plaintiffs' arguments for trade association liability because trade association stan-

¹⁶³ See *id.* at 1355.

¹⁶⁴ RESTATEMENT (SECOND) OF TORTS: LIABILITY TO THIRD PERSON FOR NEGLIGENT PERFORMANCE OF UNDERTAKING § 324A (1965) cmt. e (1965).

¹⁶⁵ See, e.g., *Wellington & Camisa*, *supra* note 108, at 18; see also *Patentas v. United States*, 687 F.2d 707, 717 (3d Cir. 1982) (citing comment e of section 324A(c) and holding that the plaintiffs would also have to allege that their knowledge of defendant's undertaking induced them to forego other remedies or precautions against the risk).

¹⁶⁶ See, e.g., *Blalock v. Syracuse Stamping Co.*, 584 F. Supp. 454, 456-58 (E.D. Pa. 1984) (finding no reliance because there was no evidence that the employer had abandoned other safety measures based on insurance company recommendations).

¹⁶⁷ See *Canipe v. National Loss Control Serv. Corp.*, 736 F.2d 1055, 1063 (5th Cir. 1984) (holding that downgrading rather than eliminating employers' own safety program is enough to establish reliance under section 324A(c)); see also *Stacy v. Aetna Cas. & Sur. Co.*, 484 F.2d 289, 295 (5th Cir. 1973) (holding that 324A (c) liability may be found where employer neglected its own safety inspection program); *Heinrich*, 532 F. Supp. at 1356 (holding that liability may be imposed if employer lessened its own safety measures).

dards are often nationally recognized and universally followed within the industry. Thus, it is unlikely that an entity relying on those recommendations will maintain as rigorous a safety program as it would have in the absence of the trade association's standards. In *In re Blood Products Litigation*, to establish causation under this provision, plaintiffs must show that their physicians at least partially relied on NHF to research and minimize the risks associated with continued treatment with factor concentrate in the light of the potential for contracting HIV.

D. Concert of Action: Section 876

Concert of action provides plaintiffs with a fourth argument to support their claims for trade association liability. Under this section, the plaintiffs' negligence argument will be based on the premise that NHF acted in concert with the manufacturers of the blood products to cause their injuries. This argument is somewhat different from the section 311, 323, and 324A arguments in that the duty portion of the negligence claim may be based on the duty of the blood product manufacturers to the plaintiffs, not just on NHF's duty to the plaintiffs. Plaintiffs may argue that NHF knew that the manufacturers were breaching a duty to them and that NHF assisted with the breach. Plaintiffs may also argue that NHF assisted the manufacturers in causing their injuries and that NHF's own conduct constituted a breach of duty under Restatement section 311, 323 or 324A. Thus, the section 876 argument can stand on its own or work in tandem with one of the other arguments.

To establish duty under section 876, plaintiffs will have to show that the tortious conduct of the manufacturers and NHF proximately caused their injuries. Section 876 provides that

[f]or harm resulting to a third person from the conduct of another, one is subject to liability if he: (a) does a tortious act in concert with another or pursuant to a common design with him; . . . (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other . . . or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes breach of duty to the third person.¹⁶⁸

¹⁶⁸ RESTATEMENT (SECOND) OF TORTS: PERSONS ACTING IN CONCERT § 876 (1965); see generally *Burnside v. Abbot Labs.*, 505 A.2d 973, 982 (Pa. Super. 1985) (examining concert of action liability).

The agreement between the parties need not be expressed in words, but may be implied and understood to exist from the conduct itself.¹⁶⁹ The Restatement emphasizes that if the encouragement or assistance is a substantial factor in causing the resulting tort, the one giving it is himself a tortfeasor and is responsible for the other's intentional or negligent acts.¹⁷⁰

Where all defendants agreed, in either an express or implied manner, to take part in a common scheme to commit a tortious act, courts may impute a concert of action to find liability.¹⁷¹ However, in order to sustain a claim for concert of action, unlike one for conspiracy, the plaintiff must show underlying tortious conduct by both parties.¹⁷²

The requisite underlying tortious conduct was found in *University System of New Hampshire v. United States Gypsum*,¹⁷³ in which the plaintiff successfully alleged that the defendants' underlying conduct, fraudulent concealment of information regarding asbestos, was tortious.¹⁷⁴ A New York court held that lead paint manufacturers and their trade association could be held liable under the theory of concert of action if evidence showed that they coordinated efforts to conceal the hazards associated with lead paint, misled the public as to that hazard, and continued to market and promote the use of lead paint despite their knowledge of the hazards.¹⁷⁵

With regard to NHF liability under section 876(b), plaintiffs can argue that NHF knew that the manufacturers of factor concentrate were breaching a duty to persons with hemophilia and that NHF provided assistance in committing that breach or encouraged the breach by recommending that persons with hemophilia continue treating with factor concen-

¹⁶⁹ RESTATEMENT (SECOND) OF TORTS: PERSONS ACTING IN CONCERT § 876, cmt. a (1965); see also, *Bichler v. Eli Lilly & Co.*, 436 N.E.2d 182, 188-89 (N.Y. 1982) (concluding that the jury may infer that a drug company effectively encouraged conduct by others by not adequately testing its product despite finding that the drug company did not consciously encourage conduct by other companies).

¹⁷⁰ RESTATEMENT (SECOND) OF TORTS: PERSONS ACTING IN CONCERT § 876, cmt. b (1965).

¹⁷¹ See, e.g., *Hymowitz v. Eli Lilly & Co.*, 539 N.E.2d 1069, 1073 (N.Y. 1989) (noting that concerted action liability exists where one company's actions assist in keeping another's defective products in the stream of commerce).

¹⁷² See, e.g., *Cresser v. American Tobacco Co.*, 662 N.Y.S.2d 374 (N.Y. Sup. Ct. 1997) (comparing concerted action and conspiracy and holding that there were alleged intentional torts to support a claim for concerted action).

¹⁷³ 756 F. Supp. 640 (D.N.H. 1991).

¹⁷⁴ See *id.* at 652.

¹⁷⁵ See *City of New York v. Lead Indus. Ass'n, Inc.*, 597 N.Y.S.2d 698, 700 (N.Y. App. Div. 1993).

trate. Plaintiffs may also argue that NHF is liable under section 876(c), on the basis that it provided substantial assistance to the manufacturers in accomplishing a tortious result, and that its own conduct constituted a breach of duty to persons with hemophilia under Restatement sections 311, 323, or 324A.

IV. CONCLUSION

The Northern District of Illinois correctly struck down NHF's First Amendment motion for summary judgment on the basis that, among other things, NHF should be subject to laws of general applicability. However, it is now up to the injured plaintiffs to defeat NHF's First Amendment defenses and establish its liability for negligence in their respective trials. As discussed above, potential arguments can be made under Restatement section 311 for negligent misrepresentation, Restatement sections 323 and 324A for negligent performance of a voluntary undertaking, or under Restatement section 876 for concert of action.